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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 869

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Petitioner,

vs.

DIXON, IRMAOS & CIA. LTDA.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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DIXON, IRMAOS & CIA. LTDA.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The above-named petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, filed October 30, 1944 (R. 310), reversing the judgment of the United States District Court for the Southern District of New York filed July 28, 1943 (R. 285).

Opinions Below.

The opinion of the United States District Judge (R. 279) and the opinion of the Circuit Court of Appeals (R. 286) reversing the judgment below are not yet reported.

Jurisdiction.

The judgment of the Court of Appeals was entered October 30, 1944 (R. 310). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925.

Statement.

The decision of the Court of Appeals reversed the judgment of the District Court, dismissing the complaint on the merits, and held petitioner bound to pay two drafts presented by respondent against letters of credit issued by petitioner in favor of respondent.

Said letters of credit stipulated payment of drafts presented thereunder only when accompanied by "full set of bills of lading". Nevertheless, respondent presented to petitioner for payment the two drafts in question, each accompanied by only one-half set of the bills of lading, and offered in lieu of the missing parts the guaranties (R. 226, 232) of the Guaranty Trust Company of New York to hold petitioner harmless from consequences arising from this "discrepancy".

Petitioner refused (R. 227, 233) to accept the guaranty against loss in lieu of compliance with the stated condition of its letters of credit and refused payment of the drafts for three reasons, one of which, namely, that only one half of the bills of lading was presented, is the subject of this petition.

Evidence of a custom among New York banks to accept guaranties of this character in lieu of a missing part of a bill of lading was admitted at the trial over petitioner's objection (R. 51-54). The trial court found that the custom existed but also that "the bank issuing the credit was, how-

ever, free to exercise its own discretion and make its own determination as to whether it would accept a guaranty in lieu of a missing bill of lading" (R. 276). The Court of Appeals, in its opinion, supporting the reversal, overruled petitioner's contention that evidence of such a custom was inadmissible to vary the unambiguous terms of the letters of credit and held that petitioner was bound by said custom.

The petitioner filed a petition for rehearing (R. 294), which was denied by the Court of Appeals (R. 309).

Questions Presented.

1. Is the rule of *Erie R. R.* v. *Tompkins,* 304 U. S. 64 (1938), to be followed in all questions of substantive law without exception?

2. May a Federal Court in the State of New York disregard a rule, established by the decisions of the New York Court of Appeals, by accepting evidence of a custom, which overrides the provisions of a written contract?

3. Are banks compelled to accept guaranties against loss for paying drafts not complying with the express provisions of their letters of credit, merely because they have not refused such guaranties in the past, although it was the understanding among banks that they had the right to refuse such guaranties?

Specifications of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding, contrary to the decisions of this Court and the decisions of the Courts of the State of New York,

that evidence of a custom may be accepted to vary the clear terms of a letter of credit.

2. In holding, contrary to a controlling decision of the New York Court of Appeals, that the meaning of the term "full set of bills of lading", which has been clearly established by testimony, may then be modified or contradicted by evidence of a custom.

3. In disregarding the uncontradicted testimony of banking expert to the effect that New York banks, in their discretion, may refuse guaranties against loss for paying drafts, presented without full compliance with the provisions of the letters of credit, against which they are drawn.

Reasons for Granting the Writ.

The principal reason for granting the writ is that the decision of the Circuit Court of Appeals arbitrarily disregards not only the decisions of this Court and its own decisions but also a decision of the New York Court of Appeals, which is an exact and controlling precedent.

That Court, obviously, has persisted, in this case, in giving effect to its disapproval of the parol evidence rule, expressed in the opinion written in support of its reversal of the District Court in *Zell* v. *American Seating Co.*, 138 F. (2d) 641 (C. C. A. 2nd, 1943). There the Court of Appeals, in holding that the lower court erred in enforcing the State parol evidence rule, argued at length that the usefulness of the rule, except in jury trials, is practically non-existent. This Court granted certiorari in the *Zell* case (321 U. S. 757) and reversed (322 U. S. 709 (1944)), four of the seven judges, who voted for reversal, basing their decision on the failure of the lower appellate court to apply the applicable State parol evidence rule. In the

case at bar, the Court of Appeals, although it paid lip service to the parol evidence rule, repudiated it, we submit, as thoroughly as it repudiated it in the *Zell* case.

This Court should decide the question, hitherto not clearly decided, whether or not a district federal court is bound, under the rule in *Erie R. R.* v. *Tompkins,* 304 U. S. 64 (1938), to follow the state court on questions involving the application of the parol evidence rule.

The decision of the Court of Appeals herein is important because its destruction of a basic legal bulwark will affect the decision of numerous cases based on documents used daily by banks in transactions involving, in the aggregate, enormous sums of money.

1. The decision of the Circuit Court of Appeals is in conflict with a controlling decision of the New York Court of Appeals.

The Circuit Court of Appeals, in accepting evidence of a custom not only varying but contradicting the express terms of the letters of credit involved, rather casually assigned as a reason for failing to apply the parol evidence rule its opinion that "the custom under consideration explains the meaning of the technical phrase 'full set of bills of lading' and is incorporated by implication into the terms of defendant's letters of credit" (R. 291). Obviously, there was no need for explanation of the term. It is understood by everyone in the business world. The trial judge, trial counsel and witnesses understood it. Respondent's own witness testified (R. 58) that it meant the presentation of the two duplicate originals of the bills of lading. The guaranties, which were offered herein in lieu of the missing bills of lading (Exs. 7, 14; R. 226, 232),

agreed to hold the respondent harmless from all consequences arising from the discrepancy, "only one set presented out of a full set of two bills of lading issued".

Assuming, however, for the purpose of argument, that the term needed explanation, consideration of the evidence of custom here involved was directly contrary to the holding of the New York Court of Appeals in *Silberman* v. *Clark*, 96 N. Y. 522 (1884).

In that case, the question considered was exactly similar to the question presented here. It was sought to prove that, by a custom in the trade, an f.o.b. contract meant that the seller of merchandise should pay for inspection. The New York Court of Appeals said:

> "In this contract, after the letters *f.o.b.* are explained and understood, there is nothing ambiguous. There is no latent ambiguity which needs explanation. All the language has a meaning, and hence there is no room, under the rules of law, for parol evidence. The meaning of the language used cannot be changed or varied by the proof of any custom, and hence there was no error in this case upon the trial in excluding such proof * * *" (p. 524).

Thus, in the case at bar, after evidence showing that "full set of bills of lading" meant all copies thereof, it was directly contrary to said decision of the New York Court of Appeals to allow evidence of a custom to accept a guaranty against loss in lieu of compliance, evidence which did not explain but, on the contrary, destroyed the established meaning of the term.

It is submitted that the application of the parol evidence rule is a question of substantive law (*Lese* v. *Lamprecht*, 196 N. Y. 32, 36 [1909]; *Mitchill* v. *Lath*, 247 N. Y. 377, 379 [1928]; *American Sugar Co.* v. *Nicholas*, 124 F. (2d) 477,

479 [C. C. A. 10th, 1941]; *Zell* v. *American Seating Co.*, 138 F. (2d) 641 [C. C. A. 2d, 1943]; *Pitcairn* v. *Hiss Co.*, 125 Fed. 110, 113 [C. C. A. 3rd, 1903]; 29 Cornell Law Quar. 543 [1944]) and that the decisions of the New York courts upon this question are binding upon Federal Courts sitting in New York (*Erie R. R.* v. *Tompkins*, 304 U. S. 64 (1938); *Huddleston* v. *Dwyer*, 322 U. S. 232 (1944)).

If these propositions are sound, then the decision of the Court of Appeals is grievously wrong in this particular case. But more important is its effect on future cases. The decision, if unreversed, becomes authority for imposing a limitation on the rule of *Erie R. R.* v. *Tompkins* and creates confusion where there was none before. If there is any doubt (*cf. American Seating Co.* v. *Zell*, 322 U. S. 709 [1944]) that a federal district court, under the rule of *Erie R. R.* v. *Tompkins*, must follow the state court in deciding questions relating to the application of the parol evidence rule, then this Court should review this case and settle that doubt.

It should also be definitely decided if the aversion of the Circuit Court of Appeals for the Second Circuit to the parol evidence rule, as disclosed by its opinion in *Zell* v. *American Seating Co., supra*, is to be approved or condemned.

In any event, the ruling in *Silberman* v. *Clark*, to which reference has been made above, only applies the law, followed in many decisions of this Court, the courts of New York and even the Circuit Court of Appeals for the Second Circuit, itself.

DeWitt v. *Berry*, 134 U. S. 306 (1890);

National Bank v. *Burkhardt*, 100 U. S. 686, 692 (1879);

Hearne v. *Marine Ins. Co.*, 20 Wall. 488, 492 (1874);

Insurance Co. v. *Wright,* 1 Wall. 456, 470 (1863);
Pink v. *American Surety Co.,* 283 N. Y. 290 (1940);
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Hopper v. *Sage,* 112 N. Y. 530 (1889);
Kerber Straw Hat Corp. v. *Lincoln,* 239 App. Div. 727 (1st Dept., 1934), aff'd w. o., 266 N. Y. 410 (1934).

It is submitted that the decision of the Court of Appeals herein cannot be reconciled with these cases or with its own prior decision in *Transatlantic Shipping Co.* v. *St. Paul Fire & Marine Ins. Co.,* 9 F. (2d) 720 (C. C. A. 2nd, 1925).

The meaning of the term, "full set of bills of lading", is clear and unambiguous. The decision of the Court of Appeals that the term may be explained by a custom, which does not explain but destroys its well known and commonly accepted meaning, is unreasonable and contrary to all the precedents cited above. This incursion upon the desirable safeguards of the parol evidence rule, it is submitted, is, in itself, sufficient reason for allowing the writ prayed herein.

2. The decision of the Circuit Court of Appeals was capricious, in that it refused to consider the limitations imposed upon the custom by the testimony of the same banking experts whose testimony was relied upon to establish the custom.

The Court of Appeals held the custom was established by the testimony of officers of leading New York banks, who testified that they knew of no instance in which a guaranty,

offered in lieu of a missing part of a bill of lading, had been refused by a New York bank. The Court, however, refused to give effect to the last sentence in Finding 13, made by the District Court, reading:

> "The bank issuing the credit was, however, free to exercise its own discretion and make its own determination as to whether it would accept a guaranty in lieu of a missing bill of lading."

This finding was fully supported by uncontradicted evidence (R. 175-6; 189; 197; 206). In short, the Court gave full effect to the testimony of these banking experts that a custom existed but refused to give any effect to the testimony of the same banking experts that the custom had the limitation described in the excerpt from Finding 13, quoted above.

Furthermore, the Court of Appeals, for no discernible reason, accepted the custom with two limitations but rejected a third, proved by the same type of evidence. It accepted the limitations that a bank, to which a letter of indemnity is offered (1) may reject the same if, in its arbitrary opinion, the offering bank is not of a satisfactory financial standing and (2) may reject the same if unsatisfactory in form. The Court of Appeals rejected the third limitation, testified to by the same witnesses, namely, that the bank issuing the letter of credit was free to make its own determination as to whether or not it would accept a guaranty in lieu of a missing bill of lading.

It is submitted that such an erratic consideration of the evidence constitutes a departure from the accepted and usual course of judicial procedure, which should be reviewed and corrected.

3. The decision of the Circuit Court of Appeals is important.

Finally, a writ of certiorari should issue because the decision below is important in the commercial world. The decision affects or may affect a very large number of letters of credit issued by New York banks,* which, if they recognized the custom involved here, when they issued letters of credit, nevertheless undoubtedly believed that they had the right to determine finally whether or not they would accept a guaranty in lieu of a missing part of a bill of lading just as they have always had the right to make or refuse loans to customers, who have previously borrowed from them many times.

This decision, in its invasion of the parol evidence rule, will also have its effect on cases involving numerous other documents used in the banking business. It is self-evident that the parol evidence rule is a beneficial rule, which defeats dishonest claims and supports the stability of banking transactions and the exactitude with which they should be conducted. It would seem to be undesirable to raise any doubt in the minds of bankers and other business men that exact terms in contracts cannot be relied upon as fixed and inviolate to a claim of modification or repudiation by virtue of an existing custom. It would be an extraordinary innovation to limit the application of the parol evidence rule to jury trials, as suggested in *Zell* v. *American Seating Co.*, 138 F. (2d) 641.

Furthermore, the rule in New York is not a matter of procedure but of substantive law (*supra*, pp. 6, 7). Is the rule of *Erie R. R.* v. *Tompkins* to be applied to all

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* Petitioner alone issues from 18,000 to 34,000 letters of credit per year (R. 149).

matters of substantive law without exception or to all matters of substantive law except the parol evidence rule?

Regardless of whether this Court thinks the Court below should be affirmed or reversed, the questions involved herein, it is submitted, certainly should be definitely answered for the future guidance of the bar.

WHEREFORE, petitioner prays that a writ of certiorari issue to review the judgment of the Court below.

Dated: New York, N. Y., January 24, 1945.

Respectfully submitted,

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THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Petitioner,

—against—

DIXON, IRMAOS & CIA. LTDA.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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DIXON, IRMAOS & CIA. LTDA.,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This is an action brought by the respondent, a Brazilian firm, to obtain payment of two drafts drawn by respondent on petitioner pursuant to two irrevocable letters of credit issued by petitioner in favor of respondent. The petitioner, The Chase National Bank of the City of New York, dishonored the respondent's drafts when they were tendered under the credits, although they were presented on time and were accompanied by the customary documents.

The letters of credit were issued by petitioner to finance two shipments of cotton which the respondent sold and shipped to a purchaser in Belgium and for which the respondent has never been paid.

The Trial Court dismissed the complaint. The Circuit Court of Appeals for the Second Circuit reversed the Trial Court and directed judgment in favor of the respondent.

The opinion of the Circuit Court of Appeals rendered in directing the judgment which this Court is asked to review is reported at 144 F. (2nd) 759.

The opinion of the United States District Judge, whose decision was reversed, is reported at 53 Fed. Sup. 933.

Facts.

The respondent, an exporter at Sao Paulo, Brazil, sold cotton to a purchaser in Belgium. The petitioner, Chase Bank, upon the purchaser's instructions, issued two irrevocable letters of credit for a total of $10,500 in favor of the respondent to finance the sales (Exhs. 1-2, Appendices, pp. 219 to 221).

The petitioner, Chase Bank, mailed the credits by steamer mail from New York City to Sao Paulo, Brazil, where they were received by the respondent on May 2, 1940 (Finding of Fact No. 3, App. p. 273).

These irrevocable credits bound the petitioner, Chase Bank, irrevocably to honor ninety day drafts, if presented at the office of the Chase Bank in New York on or before May 15, 1940, but not thereafter, if accompanied by documents including a "full set bills of lading".

The respondent, relying on petitioner's irrevocable credits, duly shipped the cotton in two separate shipments to its Belgian customer from Sao Paulo, Brazil, and received therefor two originals of each of two bills of lading (Finding of Fact No. 7, App. pp. 274-275).

It was proven beyond contradiction at the trial, and found by the Trial Judge (1) that it was the established custom where two originals of a bill of lading were obtained, to send one original bill of lading by one mail, and the other original bill of lading by following mail (Finding of Fact No. 6, App. p. 274); and (2) that in accordance with that custom, the respondent sent the docu-

ments from Sao Paulo, Brazil to New York City for presentation to the petitioner, sending one of each of the bills of lading by airmail (the only mail scheduled to arrive in New York City on or before May 15, 1940 (Finding of Fact No. 4, App. p. 273)), on May 6, 1940, and the others by steamer mail (Finding of Fact No. 7, App. pp. 274-275).

On May 15, 1940, the day the credits expired, only the bills of lading which had been forwarded by airmail had reached New York, and accordingly, on May 15, 1940, respondent's New York representative presented to the petitioner the drafts and documents, including the two originals of the bills of lading which had reached New York and were available (Finding of Fact No. 9, App. p. 275).

With said available originals of the bills of lading, the Guaranty Trust Company tendered to petitioner its guaranties against loss (Exhs. 7, 14, App. pp. 226-232) for the other original bills of lading which had been issued and which were in the mail on the way to New York by steamer, but which had not as yet reached New York (Finding of Fact No. 9, App. p. 275).

Petitioner conceded at the trial that it had no objection to the form of the guaranties and that it had no question as to the responsibility of the Guaranty Trust Company of New York (Powelson, App. p. 165), and the Court so found (Findings of Fact Nos. 12, 12A, 12B, App. p. 276). But the petitioner nevertheless rejected the drafts upon the ground that half of the bills of lading was missing (Exhs. 8, 15, App. pp. 227 and 233).

Two other alleged reasons for rejecting the drafts were also given by the petitioner (see Exhs. 8, 15, App. pp. 227, 233), but both of these alleged additional reasons, have been abandoned by the petitioner.

Respondent established at the trial that on May 15, 1940, and for some time prior thereto, there existed a general and uniform custom among New York banks, exporters and importers, of tendering and accepting the available original of a bill of lading with a prime bank guaranty under credits mentioning a full set of bills of lading where the different originals of the bills of lading issued came from a distance by separate mails, if the bank determined that the guaranty was satisfactory in form, and if it was satisfied as to the responsibility of the bank issuing the guaranty.

Six officials from five of the leading banks in New York City, including the Chase Bank (Strelow, App. pp. 79-80; Carr, App. pp. 53-54; Ward, App. p. 192; Andel, App. p. 181; Metzger, App. p. 204; Powelson, App. pp. 165-168) and two importers and exporters (Dixon, App. pp. 71-72; Boedtker, App. p. 103) testified that the custom above stated existed; and there was further testimony that to accept the available original and a prime bank guaranty under credits like those in suit was the normal circumstance (Ward, App. p. 191), and that it was done every day (Strelow, App. p. 80). These same officials and two additional officials of the Chase Bank (Cain, App. p. 108; Tovell, App. p. 127) testified that they knew of no case where a tender such as the respondent made herein was rejected solely for the reason that one of the originals of the bills of lading had been tendered when the available originals of the bills of lading were tendered with a prime bank guaranty for the other originals coming from a distance by separate mail.

In short, it is the only known time in the history of commercial credits that a bank has repudiated its credits under the circumstances herein involved.

The Circuit Court of Appeals held that "the existence of the custom was established beyond dispute", saying (p. 762):

> "Numerous witnesses, experts in the fields of banking and of commerce, testified to the existence of the custom; not one testified to a single instance where a tender such as was here made had been rejected and the draft dishonored solely on the ground that the set of bills of lading was incomplete. Indeed it is clear that the Chase Bank would in this very case have honored the drafts, had they been presented before the German invasion of Belgium. One of its witnesses naively said that before May 15, 1940 it was the custom to accept such a guaranty as was tendered, but not on that date or thereafter—as though the determining moment were not at the latest when the plaintiff acted upon the letters of credit."

The Circuit Court of Appeals reversed the decision of the Trial Judge and awarded the plaintiff judgment for the amount of the drafts. It is that decision which this Court is asked to review.

I.

The decision of the Circuit Court of Appeals involves no violation of the Parole Evidence Rule.

This point is so completely dealt with by the Circuit Court of Appeals that we can do no better than to quote from the opinion of the Circuit Court of Appeals as follows (p. 762):

> "It is true, as the defendant argues, that the law requires strict compliance with the terms of a letter

of credit. *International Banking Corp.* v. *Irving Nat. Bank*, 2 Cir., 283 F. 103. It is likewise true that numerous cases, several of which are cited by the defendant, declare that evidence of a custom is not admissible to contradict the unambiguous terms of a written contract. *DeWitt* v. *Berry*, 134 U. S. 306, 312, 10 S. Ct. 536, 33 L. Ed. 896; *Transatlantic Shipping Co.* v. *St. Paul F. & M. Ins. Co.*, 2 Cir., 9 F. 2d 720, 723; *Hopper* v. *Sage*, 112 N. Y. 530, 535, 20 N. E. 350, 8 Am. St. Rep. 771; *Green* v. *Wachs*, 254 N. Y. 437, 441, 173 N. E. 575. But it is also well settled 'that parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary'. *Hostetter* v. *Park*, 137 U. S. 30, 40, 11 S. Ct. 1, 4, 34 L. Ed. 568. See also *Nicoll* v. *Pittsvein Coal Co.*, 2 Cir., 269 F. 968, 972; *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter*, D. C. S. D. N. Y., 299 F. 991; *Victor* v. *National City Bank*, 200 App. Div. 557, 193 N. Y. S. 868; Id., 206 App. Div. 664, 199 N. Y. S. 955, affirmed 237 N. Y. 538, 143 N. E. 733; *Mutual Chemical Co.* v. *Marden, Orth & Hastings Co.*, 235 N. Y. 145, 151, 139 N. E. 221; Williston, *Contracts*, rev. ed. §§ 650, 652, 1081A. In our opinion the custom under consideration explains the meaning of the technical phrase 'full set of bills of lading' and is incorporated by implication into the terms of the defendant's letters of credit. * * * The reasonableness and utility of the local New York custom is obvious. It is absolutely essential to the expeditious doing of business in overseas transactions in these days when one part of the bill of lading goes by air and another by water. Unless an indemnity can be substituted for the delayed part, not only does quick clearance of such transactions become impossible but

also the universal practice of issuing bills of lading in sets and sending the different parts by separate mails loses much of its purpose."

II.

The decision of the Circuit Court of Appeals involves no violation of the rule of *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938), and it does not conflict with the decisions of the New York Court of Appeals in the case of *Silberman* v. *Clark*, 96 N. Y. 522 (1884), or with any other New York decision.

It may be noted first that this point was not raised by the petitioner on either the trial of the action or the argument of the appeal before the Circuit Court of Appeals.

The only prior mention of the rule in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and of the case of *Silberman* v. *Clark*, 96 N. Y. 522, on this point was in a petition for a rehearing submitted to the Circuit Court of Appeals after it had rendered its decision, and it was just mentioned there, merely "suggested" by counsel.

The holding of the New York Court of Appeals in *Silberman* v. *Clark*, 96 N. Y. 522, does not conflict with the decision of the Circuit Court of Appeals in the present case.

The point involved in the *Silberman* case was whether under a contract for the sale of rails "f. o. b., Continental port. Inspection at maker's works", the purchaser was obligated to pay for the "inspection".

The Court of Appeals gave the basis for its decision in the following language:

> "The purchasers were bound to do but one thing and that was to pay through the letter of credit. The

> price was named and that was all they were to pay. The rails were to be inspected before their delivery and were to be delivered free on board the vessel for the price named. Inspection was one of the things to be done in pursuance of the contract, and the expenses of that, like all the other expenses touching performance, were to be borne by the sellers. The words 'free on board' and the provision as to inspection, are to be construed together. The buyers were to have the rails free on board with the inspection, and this they could not have if they were to be subjected to the expenses of inspection. We think this is the natural and obvious construction of the language used and should prevail."

Clearly there is no conflict between that decision and the present case.

The New York State Court of Appeals has uniformly held that evidence of a custom and usage is admissible to explain how words and expressions are used in trade or business.

> *Mutual Chemical Co.* v. *Marden*, 235 N. Y. 145 (1923);
>
> *Victor* v. *The National City Bank of New York*, 200 App. Div. 557 (1922); same case, 206 App. Div. 664 (1923), affirmed 237 N. Y. 538 (1923);
>
> *Thomas* v. *Scott*, 127 N. Y. 133 (1891).

The Federal Court decisions, including the decisions of the United States Circuit Court of Appeals for the Second Circuit, follow the same rule.

> *Eames* v. *Claflin*, 239 Fed. 631 (C. C. A. Second 1917);

Nicoll v. *Pittsvein Coal Co.*, 269 Fed. 968 (C. C. A. Second 1920);

Kunglig Jarnvagsstyrelson v. *Dexter & Carpenter*, 299 Fed. 991 (S. D. N. Y. 1924).

The decision of the Circuit Court of Appeals is in conformity, therefore, not only with its own prior decisions, but with the decisions of the New York State Court of Appeals.

There are two inaccuracies in the petition which respondent wishes to mention lest the Court be misled. The petition states (pp. 5-6) that the guaranties tendered to the petitioner read:

> "Only one set presented out of a full set of two bills of lading issued."

Actually the guaranties read (Exh. 14, App. p. 232):

> "Only one copy presented out of a set of two bills of lading issued."

The omission of the word "full" from the guaranty indicated that the Guaranty Trust Company did not consider that all originals were the only proper tender under the credits. The available original and the guaranty were proper.

Again petitioner states (p. 5) that respondent's witness (Mr. Carr) testified that the meaning of a full set of bills of lading was confined to all originals issued.

Mr. Carr was being questioned about the tender made to the Guaranty Trust Company, and testified that it had accepted under a credit similar to those in suit, the tender of the available original of the bill of lading with a prime bank guaranty and honored the credit. He was

asked if the term "full set of bills of lading" was confined to the tender of the two originals. His answer was

"Yes, it did, a full set of documents" (App. p. 58).

Having just testified that the Guaranty Trust Company accepted the available original and a prime bank guaranty, his answer obviously was that he considered the available original and the guaranty a proper tender.

III.

Petitioner's argument is that the Chase Bank had the right to disregard the custom and to arbitrarily determine when the documents were presented whether or not it would follow the custom. This argument is wholly without merit.

It is well settled that a custom with reference to which a contract is made is as much a part of the contract as any provision of the contract.

It is equally well settled that, where one party to a contract has relied upon such a custom and acted upon it, the other party to the contract cannot void the contract by arbitrarily and without a legal reason refusing to recognize the binding force of the custom.

The Circuit Court of Appeals properly criticized that part of the Trial Court's opinion which said that the banks could follow the aforesaid custom or not as they saw fit. It should be pointed out that the testimony of the expert witnesses, (1) that the custom existed, and (2) that there was no known case in the history of commercial credits where a similar tender had been rejected, was testimony of fact. The opinions of the witnesses, that the banks were not obligated to follow the custom, were the expressions of opinions on the legal effect of the custom.

Counsel for the petitioner has described the action of the Circuit Court of Appeals in ruling as it did as "capricious" and "erratic". If such words have any place in a brief filed with this Court, it is manifest that they apply here to the conduct of the petitioner, and not to the holding herein of the Circuit Court of Appeals. It is the petitioner's action in departing from its custom for the first time which has undermined the "stability of banking transactions" and the "exactitude with which they should be conducted". If the tender of a bill of lading and guaranty is not proper compliance with the terms of the letters of credit, the petitioner should not have been accepting them daily for years past.

CONCLUSION.

The Writ of Certiorari prayed for should be denied.

Dated, New York, N. Y., February 13, 1945.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 869.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
Petitioner,

vs.

DIXON, IRMAOS & CIA. LTDA.,
Respondent.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

The following facts are clear:

1. Petitioner's letter of credit provided it would pay respondent's drafts, if accompanied upon presentation by a full set of bills of lading (p. 219);

2. Respondent's drafts, when presented, were not accompanied by a full set of bills of lading;

3. In lieu thereof, the Guaranty Trust Company of New York tendered its guaranty admitting the discrepancy but agreeing to indemnify petitioner against any loss on account thereof (p. 226).

The decision of the United States Circuit Court of Appeals in this case is that where a technical term is used (*i. e.*, "full set of bills of lading" in the case at bar), the door is open, not merely for parol evidence to determine the meaning of the term so used, but also for *any* evidence of custom or usage relevant thereto. The rule heretofore has been that evidence of custom or usage is admissible only to determine the *meaning* of a term, the meaning of which would not otherwise be clear.

There is thus a very important principle of law which should be decided by this Court. The Circuit Court of Appeals, following the principles stated by it in *Zell* v. *American Seating Co.*, 138 F. (2d) 641 (C. C. A. 2d, 1943), has applied the parol evidence rule in the case at bar in such a way that evidence of custom or usage will always be admissible even if the effect of such evidence is to *alter* the plain meaning of the language used. The State Courts of New York and the Federal Courts heretofore have admitted such evidence only to explain the meaning of a technical term. In *Silberman* v. *Clark*, 96 N. Y. 522 (1884), for example, it was clearly decided that once the meaning of a technical term has been determined "the meaning of the language used cannot be changed or varied by proof of custom" (p. 524).

Respondent's brief does not even dispute the fact that a full set of bills of lading means all copies thereof. Thus, the meaning of the term is clear. The question thus is, may the conceded meaning of the term, "full set of bills of lading" be changed or varied by parol evidence?

Respondent does not deny that the question here involved is an important one. We submit that certiorari should be granted: (1) This Court should decide whether or not the Federal Courts may so change the parol evidence rule of New York in view of the rule established in *Erie R. R.* v.

Tompkins (304 U. S. 64, 1938); and (2) If so, this Court should approve or disapprove this radical change in the application of the parol evidence rule.

Respectfully submitted,

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Dated, New York, N. Y.,
February 21, 1945.

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